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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SHIRLEY A. GRAHAM,

Petitioner,

v.

HARTFORD LIFE & ACCIDENT INSURANCE COMPANY

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action for plan benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B), is a District Court's Order remanding the matter back to the Plan Administrator for a fair determination a final appealable decision under 29 U.S.C. § 1291 when the basis for the remand is that the decision to deny benefits was arbitrary and capricious and not supported by substantial evidence?

PARTIES

The Petitioner is Shirley A. Graham ("Graham").

The Respondent is Hartford Life & Accident Insurance Company ("Hartford")

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PETITION FOR A WRIT OF CERTIORARI

Graham respectfully submits that a writ of certiorari should issue to review the judgment of the Court of Appeals, Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is found at 501 F.3d 1153 and reprinted in the Appendix ("App.") at Page 1a. The opinion of the lower court is found at 2007 WL 160309.

JURISDICTION

The United States Court of Appeal's Order and Judgment was filed on August 24, 2007. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes: 28 U.S.C. § 1291 and 29 U.S.C. § 1132 set forth at App. 23a to 32a.

STATEMENT OF THE CASE

A. INTRODUCTION

This case was originally filed in the United States District Court for the Northern District of Oklahoma under state court causes of action of breach of an insurance contract and insurance bad faith. The reason a state court cause of action was brought originally rather than an ERISA action is that the Plaintiff was a rural letter carrier with the United States Postal Service ("USPS") and had obtained her disability insurance through her union, the National Rural Letter Carriers Association ("NRLCA"), the Collective Bargaining Union for rural letter carriers. Membership in the Union and eligibility for the subject insurance required a person to be employed by the USPS and work in the rural carrier craft. Excluded from membership are temporary relief carriers. Further, the Plan provided that the premiums should be deducted from the rural letter carrier's U.S. Postal Service's wages. On April 22, 2005, more than two (2) years after the suit was filed, Senior United States District Court Judge James O. Ellison entered an Interlocutory Order determining the disability insurance Plan in question was subject to ERISA jurisprudence and that the Plan in question was not a governmental plan. Because this Order was interlocutory in nature, an appeal from that particular Order could not be taken but had to wait until the matter was fully resolved.

The action then proceeded as a normal ERISA action where the parties submitted an Administrative Record and then a briefing schedule was followed. The Court took the case under advisement and on January 20, 2006, United States District Judge Claire V. Eagan entered an Order finding that the Defendant failed to establish by substantial evidence that its denial was reasonable and concluding that the denial of benefits was arbitrary and capricious under the appropriate standard. However, rather than reinstating the benefits, the Trial Court ordered that the matter be remanded to the Plan Administrator "for a full and fair redetermination of the claim".

Graham appealed from the two (2) decisions. The first being whether or not ERISA applied to the matter at all and second, if ERISA applied, was a remand to the Plan Administrator an appropriate remedy.

Graham then filed for attorney fees which were denied and a second appeal was perfected on that issue.

The matters were consolidated and subsequently the United States Court of Appeals for the Tenth Circuit entered an Order stating that it did not have jurisdiction because the Order remanding was not a final appealable Order under 28 U.S.C. § 1291. Thus, almost seven (7) years after Graham left her job with the United States Post Office, and more

than four (4) years after she initiated this suit, she is no closer to obtaining her benefits than she was when she left her job on July 17, 2000, or when the United States Office of Personnel Management approved her for disability retirement less than six (6) months later, on December 1, 2000.

As will be discussed in more detail, the finding of the Trial Court that the denial of benefits was arbitrary and capricious was based upon the Court's conclusion that there was not substantial evidence to support the denial and, thus, the denial was arbitrary and capricious. At no time in the proceedings did Plaintiff allege any procedural defect in the administrative process. The record will reflect that the matter was fully addressed at the administrative level with two levels of appeal addressing the initial denial.

Nor did the Defendant Hartford ever request a remand but always asserted that its denial of benefits was supported by substantial evidence and was not arbitrary and capricious.

The temptation at this point is to argue that remanding a case such as this back to the Plan Administrator for a fair determination after the matter has been fully evaluated three times before in the administrative process is just one more obstacle that keeps deserving beneficiaries from receiving the benefits they are entitled to in a timely manner, if at all. If possible, this new wrinkle could be even

more offensive than the other impediments that beneficiaries face, like denial of right to trial by jury, inability to confront the witnesses against them, inability to conduct discovery, deference given to the decision by an insurance company to deny benefits and the lack of any compensatory or punitive damages. All of these are offensive to the rights of beneficiaries to receive their benefits, hinder beneficiaries' rights to receive a full, fair and complete adjudication of their claims, and most definitely encourages insurance companies and self-funded Plans to deny benefits on the skimpiest of reasons. As we will note, this case is a classic example.

Although the denial of right to trial by jury offends our United States Constitution and, in particular, the seventh guarantee found in the Bill of Rights and lack of any compensatory or punitive damages seems to offends this legislation's stated intent and savings clause, the frustration that we now address may be the most offensive of all. The reason for this is that it seems to reward wrong doing. Obviously, from a practical standpoint, an insurer such as Hartford is benefitted when they avoid or defer payment of benefits under the terms of a disability contract.

In the case at bar, the Trial Court concluded that the denial of benefits was not supported by substantial evidence and, thus, the denial was arbitrary and capricious. Hartford could not even

muster enough evidence to support its denial under the deferential arbitrary and capricious standard where all they had to do was have evidence that is more than a scintilla but less than a preponderance. As this Court reviews this Petition for Certiorari, it will be more than seven (7) years since Shirley Graham first submitted her claim to Hartford and she is no closer to getting her benefits than she was in November 2000. As this Court considers whether or not it should grant certiorari, it will be close to five (5) years since the Plaintiff filed her initial Complaint at the District Court level and yet she is even farther away from getting an adjudication on her rights to receive these benefits than she was when she first filed that Complaint.

Moreover, Graham may never be entitled to a judicial determination of whether or not ERISA jurisprudence even applies to this situation or should her attorney be entitled to an attorney fee for "successfully" carrying her burden and proving that the denial of her initial claim was arbitrary and capricious. These would seem to be compelling reasons for this Court to take this matter up.

However, equally as important and probably more compelling to this Court is the fact that there is a division among the Circuit Courts of Appeal regarding when an ERISA remand order is a final appealable order and when remand to a Plan Administrator would be appropriate. In a Tenth Circuit case that preceded the present case and one

that was relied on by both parties before the Tenth Circuit, the Tenth Circuit Court of Appeals concluded "that district court orders remanding an issue to an ERISA plan administrator are not *per se* nonfinal. The decision should be made on a case-by-case basis applying well-settled principles governing final decisions.'" *Rekstad v. First Bank System, Inc.* 238 F.3d 1259, At 1263 (10th Cir. 2001).

We will see that the different Circuits disagree as to what well-settled principles regarding finality apply to an ERISA remand to the Plan Administrator and when it is appropriate to remand a case to a Plan Administrator. The Ninth Circuit has stated, "A plan administrator will not get a second bite at the apple when its first decision was simply contrary to the facts." *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, at 1163 (C.A. 9 2001). That appears to be precisely what happened in the case at bar. We will see that there is overwhelming evidence of Shirley Graham's disability in this administrative record. The denial was based on the jaundiced review of the administrative record by Hartford and its obvious cherry picking of the record to muster more than a scintilla of evidence to support its denial. Despite this attempt and the deferential review given the denial, it was determined to be arbitrary and capricious.

As we will see, there was a full and complete medical history of Shirley Graham's condition

chronicling its onset in February of 1994 and going through August 2002. This eight (8) year medical history bookends the December 1, 2000, decision by the United States Office of Personnel Management approving Shirley Graham for disability retirement. There was the initial investigation and denial and two levels of administrative review. The Order remanding the matter back to the Plan Administrator for a fair determination of Graham's entitlement to disability benefits did not find any procedural defect and, as stated earlier, none was asserted either by the Plaintiff Graham nor by the Defendant Hartford. Given the *Rekstad v. First Bank System, Inc., supra*, decision and the decision before this Court, it is hard to imagine what kind of case the Tenth Circuit would find appropriate for appellate review. This becomes particularly confusing when you see the expressions of other Circuit Courts of Appeal For these reasons as will be set out in more detail, Graham urges this Court to grant her Petition for Certiorari to the Tenth Circuit Court of Appeals ordering the Court to accept jurisdiction and decide the issues presented to the Court of Appeals.

B. FACTUAL BACKGROUND

Graham is not asking this Court to decide the issues it presented to the Tenth Circuit Court of Appeals regarding whether the subject Plan is a government Plan and, thus, not subject to ERISA preemption, whether Graham is entitled to disability

benefits under the Administrative Record and entitlement to attorney fees. However, it is felt that the factual underpinnings of these arguments are important to this Court's decision whether to grant certiorari. In the first section, we will review some of the facts that were presented to the Tenth Circuit on the issue of the status of the Plan as a government Plan and in the next section, we will set out the exact abstract of the Administrative Record that was initially presented to the Tenth Circuit Court of Appeals in our Brief In Chief. We feel that it is particularly important to do this second section as completely as we can as these facts would go to the propriety of remanding this matter back to the Plan Administrator and the jurisdiction of the Tenth Circuit to review that Order.

> "We must first consider whether we have jurisdiction. Circuit Courts generally have jurisdiction only over "final decisions of the district courts." 28 U.S.C. § 1291; cf. id. § 1292 (describing circuit courts' jurisdiction over interlocutory decisions). In *Rekstad v. First Bank System, Inc.*, 238 F.3d 1259, 1263 (10th Cir.2001), we held that a district-court order remanding a case to an ERISA plan administrator for a determination of LTD benefits was not a final appealable decision over which we had jurisdiction. Accord *Graham v. Hartford Life & Accident Ins. Co.*, Nos. 06-5054 & 06-5142, 2007 WL 2405264 (10th Cir. Aug.24, 2007) (**dismissing for**

lack of jurisdiction when the district court had concluded that substantial evidence did not support a denial of benefits and remanded the claim to the plan for redetermination)." *Garner v. U.S. West Disability Plan* 2007 WL 2989460, ___F3d___(10th Cir. 2007) (emphasis added).

C. TRIAL COURT PROCEEDINGS

Graham filed her Complaint on February 27, 2003, alleging state court causes of action for breach of an insurance contract and Oklahoma insurance bad faith. Graham alleged that jurisdiction was with the Federal Court because of diversity.

Hartford answered alleging that ERISA applied to this matter and at a Scheduling Conference held on April 15, 2004, Senior Judge James O. Ellison entered a discovery and briefing schedule to address the issue of the application of ERISA to the case. The briefing on that issue was completed on August 17, 2004, and on April 22, 2005, Judge Ellison entered an Order determining that the subject Plan was not a government Plan and that ERISA applied. Subsequently, the Administrative Record was submitted to the Court, the parties briefed the issue of entitlement to benefits and on January 20, 2006, Judge Claire V. Eagan entered her Order that the Defendant's final decision to deny Plaintiff's claim for LTD benefits was not supported by substantial evidence, was arbitrary and capricious and

remanded the case back to the Plan Administrator for a full and fair redetermination of the claim. On that same date, Judge Eagan entered a Judgment remanding the case to the Plan Administrator, dismissing/terminating the case (terminates case).

After the Court's decision finding the denial arbitrary and capricious, Graham filed an Application for Attorney Fees pursuant to 29 U.S.C. § 1132(g)(1). The attorney fee application was timely filed and was referred to the Magistrate for a Report and Recommendation. Magistrate Judge Sam A. Joyner entered a Report and Recommendation to deny the attorney fees and a timely objection to that Report and Recommendation was filed. On June 28, 2006, United States District Court Claire V. Eagan overruled the Plaintiff's objection to the Report and Recommendation.

D. APPELLATE PROCEEDINGS

Graham initially appealed the Interlocutory Order finding that the Plan was not a government Plan and, thus, subject to ERISA, as well as the Order remanding the case to the Plan Administrator under Appeal Case No. 06-5054. Later a second appeal was perfected under Case No. 06-5142 on the issue of entitlement to attorney fees.

In Case No. 06-5054, the Plaintiff filed her Initial Brief and then the Defendant Hartford filed its

Response Brief. By virtue of the allegation in the Response Brief filed by Hartford that the January 20, 2006, Order and separate Judgment did not constitute a final appealable decision under 28 U.S.C. § 1291, the United States Court of Appeals for the Tenth Circuit entered an Order on June 1, 2006, tolling the briefing on the merits and directing Graham to file a separate jurisdictional memorandum brief within twenty-one (21) days of that Order. On August 14, 2006, the Appellate Court entered an Order reserving judgment on the Appellate jurisdictional issue of finality raised by Hartford and ordered that the jurisdictional issue be submitted to the panel selected to handle the appeal. Of course, further granting Graham the opportunity to file a Reply Brief within fourteen (14) days of that Order.

The Tenth Circuit denied an Application to Consolidate the two (2) appeals but did subsequently consolidate the two (2) appeals for oral argument which was held on March 5, 2007. On August 24, 2007, the Court filed its opinion that there was no appellate jurisdiction.

REASONS THE PETITION SHOULD BE GRANTED

1. THERE IS A DIVISION AMONG THE CIRCUITS REGARDING THE FINALITY OF A RULING SUCH AS THE ONE BEFORE THIS COURT

We have set out the extensive abstract of the Administrative Record above because we feel it is important for this Court to understand the basis of the Trial Court's ruling and why we believe a ruling such as this should be considered a final, appealable order. It is clear from the Tenth Circuit Court of Appeals' Opinion, as well as the Trial Court's Opinion, that the finding that the denial of benefits was arbitrary and capricious and not supported by substantial evidence went to the merits of the claim rather than some sort of procedural defect. In finding the denial arbitrary and capricious, the Trial Court made the following observations regarding the Administrative Record:

> "The Court finds that Hartford's decision to deny plaintiff's claim for LTD benefits was arbitrary and capricious. Hartford has not met its burden of proving the reasonableness of its decision by substantial evidence. Hartford referenced, as the basis for its determination, the 1997 accommodation for plaintiff's disability and Dr. Emel's January 23, 2001 statement that plaintiff's medical condition 'does not' restrict her from work. By relying on the 1997 USPS accommodation to justify the denial, Hartford suggests that once an individual requests and receives accommodation for a disability, she foregoes future eligibility for LTD benefits. Hartford undertook no independent medical review of

changes in plaintiff's condition between the accommodation in 1997 and her retirement in 2000. Absent additional evidence, prior accommodation does not amount to substantial evidence on which to base a denial of LTD benefits. *See Hawkins v. First Union Corp. Long-Term Disability Plan,* 326 F.3d 914, 918 (7th Cir.2003) ("A disabled person should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working").

Further, Hartford's reliance on Dr. Emel's January 23, 2001 statement, which favors their decision, ignores his July 26, 2000 statement that plaintiff is disabled and his March 7, 2001 statement that she is incapable of sitting for more than one hour. The record suggests that Hartford gave undue weight to the January 23, 2001 statement. *See Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 834, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) ("Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence ..."). In addition, while independent medical examinations are not required to establish reasonableness, "[w]here, as here, a conflict of interest may impede the plan administrator's impartiality, the administrator best promotes the purposes of ERISA by obtaining an independent

> evaluation." *Fought*, 379 F.3d at 1015; *see Gaither v. Aetna Life Ins. Co.*, 388 F.3d 759, 773 (10th Cir.2004) ("fiduciaries cannot shut their eyes to readily available information when the evidence in the record suggests that the information might confirm the beneficiary's theory of entitlement and when they have little or no evidence in the record to refute that theory."). *Graham v. Hartford Life & Accident Ins. Co.*, 2006 WL 160309, P. 3-4 (N.D. Okla. 2006)

After making the above observations, the Court ordered "that defendant's November 27, 2001 final decision to deny plaintiff's claim for LTD benefits is hereby **REMANDED** to the Plan administrator for a full and fair redetermination of the claim." *Graham v. Hartford Life & Accident Ins. Co.*, at P.4.

It is important to point out that the Court is not telling the Defendant to accept any new evidence or reconsider the matter in light of the Court's interpretation of contract language or based upon any other finding or instruction that the Court is giving the Plan Administration. The Court is simply saying look at the same evidence you have, but this time look at it fully and fairly.

The Tenth Circuit has recognized that there is a split of authority over whether an order remanding a matter to an ERISA administrator is final.

"Circuit courts have split over whether an order remanding a matter to an ERISA plan administrator is final. The First, Sixth, and Eleventh Circuits have held that such orders are non-final. *See Bowers v. Sheet Metal Workers' Nat'l Pension Fund,* 365 F.3d 535, 537 (6th Cir.2004); *Petralia v. AT & T Global Info. Solutions Co.,* 114 F.3d 352, 354 (1st Cir.1997); *Shannon v. Jack Eckerd Corp.,* 55 F.3d 561, 563 (11th Cir.1995). The Seventh Circuit, however, considers ERISA remand orders to be final and appealable. *See Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan,* 195 F.3d 975, 977-80 (7th Cir.1999). In *Hensley v. N.W. Permanente P.C. Ret. Plan & Trust,* the Ninth Circuit employed an approach similar to our 'practical finality rule' and held that an ERISA remand order is final when 'appellate jurisdiction is necessary to ensure proper review of an important legal question which a remand may make effectively unreviewable.' 258 F.3d 986, 994 (9th Cir.2001) (*overruled on other grounds by Abatie v. Alta Health & Life Ins. Co.,* 458 F.3d 955, 966 (9th Cir.2006))." *Metzger v. UNUM Life Ins. Co. of America* 476 F.3d 1161, *1165 (10th Cir. 2007).

We first do not necessarily agree with the statement above regarding the First Circuit. The Tenth Circuit cites the case of *Petralia v. AT & T Global Info. Solutions Co.*, 114 F.3d 352, 354 (1st Cir. 1997). In that case, there was a procedural defect and not a full administrative review of the beneficiary's claim. The Order was that the Plan was to afford Ms. Petralia a full opportunity to establish her continued eligibility for short term benefits. We believe there is a difference between an order remanding a matter to the administrator for acceptance of further evidence and an order simply remanding the matter back for a fair determination. It appears that the Seventh Circuit would treat these type of remand orders differently. At this point, however, we would point out that we do not believe that the First Circuit as a matter of course believes all such remand orders are not subject to appeal. In a later case, the Circuit states that they review a district court's choice of remedy for an ERISA violation for an abuse of discretion.

> "An appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion. *Zervos v. Verizon New York Inc.*, 277 F.3d 635, 648 (2d Cir.2002); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir.2001). Once a court finds that an administrator has acted arbitrarily and capriciously in denying a claim for benefits, the court can either

remand the case to the administrator for a renewed evaluation of the claimant's case, or it can award a retroactive reinstatement of benefits. *See Welsh v. Burlington N., Inc., Employee Benefits Plan*, 54 F.3d 1331, 1340 (8th Cir.1995) (recognizing that a district court has power to calculate and award unpaid benefits).

Liberty cites the familiar proposition that ERISA 'provides no authority for a court to render a *de novo* determination of an employee's eligibility for benefits' in support of its argument that the district court could not award Cook retroactive benefits. *Peterson v. Cont'l Cas. Co.*, 282 F.3d 112, 117 (2d Cir.2002). Important though it is in many other contexts, this axiom underlying the principle of ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately. "[R]etroactive reinstatement of benefits is appropriate in ERISA cases where, as here, 'but for [the insurer's] arbitrary and capricious conduct, [the insured] would have continued to receive the benefits' or where 'there [was] no evidence in the record to support a termination or denial of benefits.' "

Grosz-Salomon, 237 F.3d at 1163 (modifications in original) (quoting *Quinn v. Blue Cross & Blue Shield Ass'n.*, 161 F.3d 472, 477 (7th Cir.1998)); *see also Zervos*, 277 F.3d at 648 ('**[A] remand of an ERISA action seeking benefits is inappropriate where the difficulty is not that the administrative record was incomplete but that a denial of benefits based on the record was unreasonable.**') (internal quotation marks omitted); *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321, 1330 (11th Cir.2001) ('We do not agree, however, that a remand to the plan administrator is appropriate in every case.'); *Grosz-Salomon*, 237 F.3d at 1163 ('[A] plan administrator will not get a second bite at the apple when its first decision was simply contrary to the facts.').

We acknowledge that several of these quotations may overstate the matter. We have no doubt that in some situations a district court, after finding a mistake in the denial of benefits, could conclude that the question of entitlement to benefits for a past period should be subject to further proceedings before the ERISA plan administrator.

This might be true, for example, if the denial is less flagrant than in this case and if there were good reason to doubt that a reassessment would justify benefits for some or all of the past period. However, the variety of situations is so great as to justify considerable discretion on the part of the district court and, in this instance, it has not been abused.

Liberty argues that there is no evidence of Cook's disability status after October 1998, when it terminated her disability benefits, and hence no basis for awarding her disability benefits past that date. However, the absence of information about Cook's disability status resulted directly from Liberty's arbitrary and capricious termination of her benefits. As a recipient of disability benefits, Cook was under a continuing obligation to adduce proof of her disability pursuant to the long-term disability plan. Once Liberty terminated her benefits, she was no longer obliged to update Liberty on her health status. It would be patently unfair to hold that an ERISA plaintiff has a continuing responsibility to update her former insurance company and the court on her disability during the pendency of her

internal appeals and litigation, on the off chance that she might prevail in her lawsuit. Moreover, as the district court notes in its decision, reconstruction of the evidence of disability during the years of litigation could be difficult for a recipient of long-term disability benefits wrongly terminated from a plan.

This is not to say that Liberty cannot terminate Cook's benefits in the future. Once she is reinstated to the plan, she will again be obligated to prove that she is disabled under the 'any occupation' definition listed in the plan documents. If she cannot do so, or if Liberty acquires sufficient evidence to contradict her doctor's opinion, it could pursue termination of her eligibility for benefits at that time.

The district court also awarded Cook attorney's fees, as it has discretion to do under 29 U.S.C. § 1132(g)(1). An appellate court reviews an award of attorney's fees solely for abuse of discretion. *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 223 (1st Cir.1996). We find no abuse of discretion in that award." *Cook v. Liberty Life Assur. Co. of Boston* 320

F.3d 11, *24 -25 (1st Cir. 2003)
(emphasis added)

It goes without saying that the District Court's Order remanding the case back to the Plan Administrator for a fair determination is an equitable remedy. Thus, it appears that the First Circuit reviews such an order as a final appealable order and subject to appellate review under an abuse of discretion standard.

Moreover, despite the Tenth Circuit's analysis in the case of *Metzger v. UNUM Life Ins. Co. of America, supra,* it also appears that the Ninth Circuit Court of Appeals would likewise review such an order for an abuse of discretion.

> "When a district court's remedy takes the form of an equitable order, we review that order for an abuse of discretion. We find no such abuse here. Contrary to Paul Revere's assertion, retroactive reinstatement of benefits is appropriate in ERISA cases where, as here, 'but for [the insurer's] arbitrary and capricious conduct, [the insured] would have continued to receive the benefits' or where 'there [was] no evidence in the record to support a termination or denial of benefits.' In other words, a plan administrator will not get a second bite at the apple when

> its first decision was simply contrary to the facts. This court's decision in *Saffle v. Sierra Pacific Power Company Bargaining Unit Long Term Disability Income Plan* does not counsel to the contrary. *Saffle* stands for the proposition that 'remand for reevaluation of the merits of a claim is the correct course to follow when an ERISA plan administrator, with discretion to apply a plan, has misconstrued the Plan and applied a wrong standard to a benefits determination.' This proposition is both unremarkable and inapposite. First, as discussed above, the operative plan documents do not confer discretion on Paul Revere. Second, even if they did, Paul Revere did not misconstrue the definition of 'disabled,' or apply the wrong standard to evaluate Grosz-Salomon's claim. It applied the right standard, but came to the wrong conclusion. Under these circumstances, remand is not justified. Retroactive reinstatement of benefits was proper. *Grosz-Salomon v. Paul Revere Life Ins. Co.* 237 F.3d 1154, *1163 (9th Cir. 2001)

Perhaps the most comprehensive and certainly the best reasoned approach is that of the Seventh Circuit. After the Court determined that the

judgment was not too uncertain to be enforced and that the District Court did not plan to enter any further orders, the Court then turned to whether or not the nature of the relief ordered was a non-final order. In doing so, the Court also recognized the split of authority between the various Circuits.

> But the nature of the relief, a remand to UNUM, may do so. Although it is doubtful as an original matter that a district court may 'remand' ERISA claims, as if to administrative agencies, we have held that courts may treat welfare benefit plans just like administrative law judges implementing the Social Security disability-benefits program. *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F.3d 472, 476-78 (7th Cir.1998); *Schleibaum v. Kmart*, 153 F.3d 496, 503 (7th Cir.1998). That makes it necessary to determine whether a remand is appealable as a final decision under 28 U.S.C. § 1291.
>
> One court of appeals has answered 'yes' without analysis. *Snow v. Standard Insurance Co.*, 87 F.3d 327, 332 (9th Cir.1996). Two courts have answered 'no,' analogizing the remand to a district court's order setting the case for a new trial. *Petralia v. AT&T Global*

> *Information Solutions Co.*, 114 F.3d 352 (1st Cir.1997); *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir.1995). *Petralia* thought it implicit in a remand that the parties may return to the district court without filing a new complaint following the plan's fresh decision, and if so then the district court's decision cannot be called final. A more recent decision of the ninth circuit called *Petralia*' s assessment persuasive, *Williamson v. Unum Life Insurance Co.*, 160 F.3d 1247, 1252 (9th Cir.1998), though because the judgment in *Williamson* was not final by any standard (the district court had resolved a few disputed issues but had not awarded *any* relief) *Snow* was not overruled. A fourth court of appeals has noticed the conflict without taking a stand. *Crocco v. Xerox Corp.*, 137 F.3d 105, 108 (2d Cir.1998). Now it is our turn." *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan* 195 F.3d 975, *978 (7th Cir. 1999)

After recognizing a split of authority, the Court then took its stab at the issue. It is this writer's belief that this is the best and most well reasoned approach. The Seventh Circuit likened the remand of an ERISA matter back to the Plan Administrator like a remand of a matter back to a

Social Security Administrative Judge. Although the purpose of this Petition is simply to point out to the Court that there appears to be a split of authority between the Circuits, we would opine that this approach seems to be the best and the most well reasoned. In cases where additional evidence is needed or where a Plan Administrator needs to reevaluate evidence in light of a Court's direction where it is anticipated the Court will then make additional rulings based upon the expanded record, that certainly is not a final, appealable order. But where the Court makes a judgment affirming, modifying or reversing the decision, with or without remand, that would be an appealable order. Obviously, that is what we have in the case at bar. There is no direction or request that the Plan Administrator expand the Administrative Record but simply an order reversing the denial. There really is no additional evidence available. All of the relevant medical records of Shirley was before the Plan Administrator in the three tiered decision making process. An independent medical evaluation most certainly would tell us what Shirley Graham's condition is now but not what it was seven (7) years ago when she made application for her benefits. In any event, the analysis by the Seventh Circuit is certainly instructive but at this particular point it simply points out that there is at least a third way of reviewing whether or not an order remanding a claim for further proceedings before the Plan Administrator is a full and final appealable Order.

If the justification for a remand to an ERISA plan's administrator is that the plan makes the same kind of decisions as the Social Security Administration, then it is important to know the jurisdictional consequences of a remand in a Social Security case. Two sentences of 42 U.S.C. § 405(g) authorize remand in different situations. Sentence four authorizes the district court to enter 'a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.' Sentence six allows the court to remand for the receipt of new evidence, but without entering a judgment determining the propriety of the decision previously rendered. *Sullivan v. Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990), holds that a sentence-four remand, which depends on a finding of error in the Commissioner's decision, is appealable under § 1291 as a final decision, while a sentence-six remand is not final or appealable because no adjudication has taken place. See also *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998). A sentence-four remand concludes the

litigation in the district court; any protest about the Commissioner's decision on remand requires a new suit. But a sentence-six remand works like a yo-yo; once the record has been enlarged, the district court finally decides whether the administrative decision is tenable. Remands to plan administrators serve the same functions as remands to the Commissioner, which implies the same jurisdictional treatment for purposes of § 1291. If the district court finds that the decision was erroneous and enters a judgment wrapping up the litigation, that decision is appealable even if extra-judicial proceedings lie ahead; but if the court postpones adjudication until after additional evidence has been analyzed, then it has not made a final decision. The Supreme Court drew this line in *Finkelstein* in part because it was concerned that it would otherwise be impossible for the Commissioner to obtain review of an adverse decision by a district court. If the court directs the Commissioner to apply a specific rule, or accept specific evidence, and the Commissioner carries out that directive and awards benefits, the case may never return to court. Unum may say the same about the remand ordered

here. *Petralia* assumed that the case was bound to come back to the district court, but as this example shows it need not do so. At all events, the Court added in *Forney*, an appeal under § 1291 does not depend on who won in the district court or whether the remand is likely to prevent renewed litigation. The rule is mechanical: all sentence-four remands are appealable. *Forney* holds that the claimant is as entitled to appeal a remand as is the Commissioner. Forney contended that she was entitled to immediate victory without the need for a remand, and the Supreme Court held that Forney could present this claim to the court of appeals before the remand occurred. Perlman occupies Forney's position, and unum occupies the Commissioner's position in *Finkelstein*, for the district court's remand is based on a finding of error (parallel to sentence four) rather than new evidence (sentence six). Just as in *Finkelstein* and *Forney*, the district court entered a Rule 58 judgment indicating that the decision to deny benefits was in error, and that the court is done with the case. "*Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan* 195 F.3d 975, *978 -979 (7th Cir. 1999)

In addition to analyzing cases dealing with Social Security remands, the Court also went on to analyze the issue of whether such orders are appealable comparing them to a remand to an arbitrator. In its analysis, it came to the same conclusion that such an order is subject to appellate jurisdiction.

> "Before concluding that ERISA remands are just like Social Security remands, we must consider a second possibility: that an ERISA remand is most similar to a remand to an arbitrator. Like an arbitrator, the administrator of an ERISA plan is a private dispute resolver. It therefore may be instructive to explore whether an order declining to enforce an award but directing additional arbitral proceedings is appealable.Our court first considered that question in *Shearson Loeb Rhoades, Inc. v. Much*, 754 F.2d 773 (7th Cir.1985). Recognizing that the circuits then were divided on the question, we came down firmly on the side of no appellate jurisdiction. Contemporaneously with *Much*, another circuit adopted a contrary view, *United Steelworkers v. Adbill Management Corp.*, 754 F.2d 138, 140 & n. 1 (3d Cir.1985) (equating a remand to an

order requiring arbitration in the first place), but we reaffirmed *Much* in *United Steelworkers v. Aurora Equipment Co.*, 830 F.2d 753 (7th Cir.1987). *Much* and *Aurora Equipment* give a common reason for their conclusion: that remands to arbitrators should be treated just like remands to administrative agencies, which at the time of *Much* and *Aurora Equipment* were widely thought to be non-final. Three years after *Aurora Equipment*, that premise was undermined by *Finkelstein*, and *Forney* has completed the process of making administrative remands generally appealable. So if we adhere to the rationale of *Much* and *Aurora Equipment*, the comparison of ERISA remands to arbitration remands does not lead in a new direction; it leads right back to the administrative-law analogy, and thus (today) to appellate jurisdiction. Neither *Much* nor *Aurora Equipment* has been cited since *Finkelstein*, but for a reason that does not reflect a change of heart about the classification of arbitral remands under § 1291. In 1988 Congress changed the rules for appeals from decisions concerning arbitration. Under 9 U.S.C. § 16(b) any order by a district court directing the parties to arbitrate is non-

appealable, but § 16(a)(1)(E) provides that any order 'modifying, correcting, or vacating an award' may be appealed immediately. Courts of appeals routinely assume, though without discussion, that an order vacating an arbitrator's decision but remanding for additional arbitration is appealable under § 16(a)(1)(E), rather than non-appealable under § 16(b). See, e.g., *Aircraft Braking Systems Corp. v. Automobile Workers*, 97 F.3d 155 (6th Cir.1996). *Aurora Equipment* supports the conclusion that a remand should not be treated like an original order to arbitrate, so this circuit, too, presumably will entertain jurisdiction under § 16(a)(1)(E) when the time comes. Thus whether we think of remands to arbitrators as equivalent to remands to agencies (the rationale of *Much* and *Aurora Equipment*) or as orders vacating awards, the remands would today be appealable, which offers further support for the conclusion that § 1291 permits appeal of a remand to an ERISA administrator.

Permitting appeals from remand orders does carry a cost-not only because it sets the stage for successive appeals if the decision on remand should be contested,

> but also because it causes the attorneys' fees dispute to come to a head prematurely. How is one to tell whether Perlman is a 'prevailing party' entitled to fees until we know the final outcome? It is tempting to treat the remand as non-final simply in order to postpone the fee question until the outcome is known. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan* 195 F.3d 975, *979 -980 (7th Cir. 1999).

We thus see that there is a definite split of authorities between the various Circuits and this split of authority substantially affects the rights of beneficiaries and, in some instances, even Plan Administrators. Graham asserts that it is reasonable to believe that had this appeal been brought in the First, Fourth, Seventh or Ninth Circuit Court of Appeals she would now have an order addressing the merits of her appeal and, in all likelihood, would now be receiving her court ordered benefits and perhaps even preparing for her state court cause of action for insurance contract benefits and/or insurance bad faith. Even if our assessment is wrong on what the final appellate resolution would be, we feel we would at least have an end to the ERISA litigation and if nothing more, closure. These distinctions between the Circuits effect substantive rights and not for merely differing approaches to a complex legal decision. In one court, you get

resolution of your lawsuit. In another court, the beneficiary gets thrown back into the rabbit hole. The compelling reason for this Court to grant certiorari is that in some Circuit Courts you get to have your matter heard and in other Courts you do not even get resolution of your claim. It is difficult to imagine a situation where the different approaches of the Circuit Court of Appeals produces such a dramatic impact on the outcome of a matter.

2. MAKING REMAND ORDERS SUCH AS THE ONE BEFORE THIS COURT NON-APPEALABLE VIOLATES THE PURPOSE AND INTENT OF THE ERISA STATUES AND VIOLATES BENEFICIARIES' DUE PROCESS RIGHTS.

In the 1974 U.S. Code and Administrative News, in its final report the Committee stated as follows:

> "The enforcement provisions have been designed specifically to provide the secretary and the participants and their beneficiaries with broad remedies for redressing or permitting violation of the Retirement Income Security for Employees Act as well as the amendments made to Welfare Pension Disclosure Act. **The intent of the committee is to provide the full range of legal and equitable**

> **remedies available both in state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants."** 1974 U.S. Code and Administrative News, Page 4655.

As an attorney who has represented insureds and beneficiaries over the last seventeen (17) years, I yearn for the procedural obstacles which in the past appeared to have hampered enforcement of fiduciary responsibilities for the recovery of benefits due to the participants. That being said, it appears that nothing more than a legislative modification of ERISA would address much of the problems that we encounter at this particular point. However, this Court seems to be in a unique position regarding this particular issue. We are talking about what type of order would be an appealable order and who better to address question than this Court. Particularly in light of the fact that the various Circuit Courts seem to struggle mightily with this question and have developed different approaches which substantially and significantly affect the rights of the litigants depending on what circuit they live in.

Unquestionably, remand back Plan Administrators who can not muster enough evidence

to support their initial denial encourages wrongful denial and delays receipt of deserved benefits. Allowing remands such as this, does nothing more than to thwart and totally defeat the stated purposes of ERISA. This Court has the unique opportunity to breathe some life back into ERISA and its legislative intent.

CONCLUSION

Graham and her counsel obviously believe that there are strong public policy and fairness issues which would warrant a grant of certiorari and a consideration by this Court.

However, the strongest argument for certiorari is simply the fact that there is varying approaches to whether or not an order remanding a matter back to a Plan Administrator is a final and appealable order. These differences result in substantial and significant differences in the rights of litigants to have their matter fully, fairly and efficiently resolved. Regardless of how this Court would eventually come down on this issue of appealability of an order such as the one before this Court, it is essential that there be uniform and consistent handling of this issue throughout the Circuits.

Respectfully Submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHIRLEY A. GRAHAM,

Plaintiff-Appellant,

v. Nos. 06-5054 and 06-5142

HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Courtfor the Northern District of Oklahoma(D.C. No. 03-CV-0144-CVE)

Joseph F. Clark Jr., Clark & Warzynski, P.A., Tulsa, Oklahoma, for Plaintiff-Appellant.

Timothy A. Carney, Gable & Gotwals, Tulsa, Oklahoma, for Defendant-Appellee.

Before KELLY and EBEL, Circuit Judges, and MURGUIA,* District Judge.

EBEL, Circuit Judge

*Honorable Carlos Murguia, District Court Judge, District of Kansas, sitting by designation.

Plaintiff-Appellant Shirley A. Graham brought suit after she was denied long-term disability benefits under a plan administered by Defendant-Appellee Hartford Life & Accident Insurance Company ("Hartford"). The District Court for the Northern District of Oklahoma concluded that Hartford's denial of Graham's claim violated the Employment Retirement Income Security Act (ERISA) because Hartford's decision was arbitrary and capricious. The court did not award Graham benefits, but instead remanded the claim to Hartford for a "full and fair redetermination." Graham appeals both the decision to remand and the court's earlier decision that ERISA preempted her state law claim. (No. 06-5054.) In companion case No. 06-5142, Graham appeals the court's denial of her request for attorney's fees.

We conclude that the district court's order to remand Graham's claim for benefits to Hartford is not a final decision that gives rise to our jurisdiction under 28 U.S.C. § 1291. Because Graham will have the

opportunity later to appeal the issues before us once a final judgment has been entered, we DISMISS this appeal for lack of jurisdiction. We further hold that Graham's related action for attorney's fees is not ripe, and therefore VACATE the district court's denial of her request for fees, and REMAND with directions to dismiss her motion without prejudice.

I. Background

Graham was employed by the United States Postal Service since 1976 as a mail carrier. She also was a member of the relevant collective-bargaining union, the National Rural Letter Carriers' Association ("NRLCA"). In 1994, while carrying mail, Graham encountered a small but aggressive dog. In stepping away from the dog, she backed off the sidewalk and twisted her knee. This injury required surgery and precipitated more problems in her knees and feet, including osteoarthritis. Despite her attempt to work in a sedentary position for the Postal Service from 1997 to 2000, she continued to have health problems.

NRLCA offered its members the opportunity to participate in a long-term disability insurance plan. Even though the collective bargaining agreement with the Postal Service did not provide for such a plan, the NRLCA arranged for the Postal Service to deduct premiums from its participating employees' paychecks. Graham applied to participate in the NRLCA's long-term disability benefits plan, and became insured on November 22, 1997.

Graham's last day of work was July 15, 2000. She applied for disability retirement with the Postal Service, which was approved on December 1, 2000. On October 27, 2000, Graham filed a claim for long-term disability benefits with Hartford, the administrator of NRLCA's long-term disability plan. Graham submitted a statement from her attending physician, Dr. Jeffrey Emel, that diagnosed ankle osteophytes and an ankle sprain. Hartford considered Graham's claim in early 2001, and sought a clarification from Dr. Emel regarding Graham's ankle and knee problems. Hartford then denied Graham's claim on the basis that she did not meet the plan's definition of "totally" disabled, defined as unable to perform the essential duties of one's occupation and as a result earn less than 20 percent of one's pre-disability earnings. Hartford specifically concluded that Graham's most recent occupation was classified as sedentary, and that she had not shown that she could not perform sedentary work. Graham appealed, submitting additional documentation from Dr. Emel in which he stated that Graham could not drive or sit for more than an hour at any one time. However, Hartford again rejected Graham's claim on the same basis as its previous denial. Graham made a second and final internal appeal to Hartford, which again denied her claim because it concluded a job that accommodated her disability was available to her.

Having exhausted her internal appeals, Graham filed suit in federal court on February 27, 2003, invoking the court's diversity jurisdiction. She alleged

that Hartford had breached its duty of good faith and fair dealing-an Oklahoma state law claim-by failing to investigate, evaluate and pay Graham's claims properly. She further alleged that Hartford's "malicious" and "intentional" conduct had caused her extreme emotional distress and financial losses. As a remedy, she sought actual and punitive damages.

Graham's complaint did not mention ERISA. ERISA provides a private right of action to a beneficiary under an ERISA-covered plan, but limits a claimant's remedies to "recover[y of] benefits due to him" and "enforce[ment of] his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). ERISA does not allow consequential or punitive damages. See Allison v. UNUM Life Ins. Co., 381 F.3d 1015, 1025 (10th Cir.2004).

The district court first decided that the NRLCA plan was governed by ERISA, and that ERISA preempted Graham's state law claim. Specifically, the court found that the NRLCA plan did not fall under the "governmental plan" exception to ERISA coverage, because the union-offered insurance lacked an adequate connection to governmental control, functional responsibilities and financial support. The district court accordingly dismissed Graham's state law claim against Hartford. The court then ordered the parties to submit an administrative record within 45 days so the court could review the merits of Graham's claim for benefits under the NRLCA plan. In so doing, the court apparently converted Graham's complaint to

an ERISA action. There is no indication in the record that Graham objected at this time to the court's decision to substitute her state law claim with one brought under ERISA.

Eight months later, the district court ruled on the merits of Graham's claim for benefits.[1] Employing

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[1]Neither the parties nor the court precisely described the procedural posture of the case at the time the court rendered its decision to remand Graham's claim. Graham initially submitted a brief to the district court on her "entitlement to benefits" by calling it a "motion for judgment as a matter of law." The clerk requested that Graham refile the document as a brief. Hartford responded, also in the form of a brief. The district court's resulting decision simply addresses the merits of Graham's claim under ERISA without reference to any of the motions for judgment permitted under the Federal Rules of Civil Procedure.

Even though ERISA claims have a distinct standard of review, see Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) and Fought v. UNUM Life Ins. Co., 379 F.3d 997, 1002, 1006 (10th Cir.2004), we expect a district court's resolution of those claims to comport with the Federal Rules of Civil Procedure, which typically would be to treat them as a motion for summary judgment. See, e.g., Allison, 381 F.3d at 1020; Fought, 379 F.3d at 999, 1002; Rekstad v. First Bank Sys., 238 F.3d 1259, 1261-62 (10th Cir.2001); Albright v. UNUM Life Ins. Co., 59 F.3d 1089, 1091 (10th Cir.1995).

ERISA, the court concluded that Hartford's decision was arbitrary and capricious, specifically that it failed to prove that its denial of benefits was supported by substantial evidence under Sandoval v. Aetna Life & Cas. Ins. Co., 967 F.2d 377, 382 (10th Cir.1992). The court faulted Hartford for: relying on the fact that Graham had been able to work in a modified job for the Postal Service, even though the Postal Service established the accommodation three years prior to her disability benefits claim; giving undue weight to a single statement by her treating physician that was not consistent with the other medical evidence in the record; and not undertaking an independent medical review in the face of conflicting evidence. The court did not state that Graham was necessarily eligible for disability benefits, but instead found that, in "[v]iewing the record as a whole," Hartford did not meet its evidentiary burden to support the denial of benefits to Graham.

The district court did not award Graham benefits; instead, the court remanded her claim to Hartford "for a full and fair redetermination." The district court did not state whether or not it would retain jurisdiction over the matter. However, the docket entries administratively entered for this decision indicate that the court was "dismissing/terminating" the case.

Graham petitioned the district court for attorney's fees, which may be awarded at the court's discretion under ERISA. See 29 U.S.C. § 1132(g)(1). The court applied our five-factor standard from Gordon v. U.S. Steel Corp., 724 F.2d 106, 109 (10th Cir.1983), and determined that a fee award would be inappropriate. Specifically, the court said it had made no finding of bad faith on the part of Hartford, and noted that "the record does not suggest that plaintiff's claim for benefits is particularly meritorious."

On appeal, Graham: (1) seeks to revive her state law claim, contending that NRLCA's disability insurance is a governmental plan exempt from ERISA because the Postal Service recognizes the NRLCA as a collective-bargaining union; (2) argues that the court should have awarded her disability benefits rather than remanding the claim to Hartford; and (3) asserts that an award of attorney's fees is appropriate, alleging that Hartford engaged in "bad faith" conduct.

Hartford does not appeal the district court's conclusion that its decision was arbitrary and

capricious. Instead, Hartford argues that we have no jurisdiction over this appeal, on the theory that a district court's decision to remand a claim to a plan administrator is not a final appealable decision under the meaning of 28 U.S.C. § 1291.

II. Jurisdiction and Finality

We have jurisdiction "of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. "It is well settled that we can only address the underlying merits of a lawsuit if it meets the requirements for appellate jurisdiction outlined in 28 U.S.C. § 1291." Albright v. UNUM Life Ins. Co., 59 F.3d 1089, 1092 (10th Cir.1995). "A final decision is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " Rekstad v. First Bank Sys., 238 F.3d 1259, 1261 (10th Cir.2001) (quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)). "In considering whether the judgment constitutes a 'final decision' under § 1291, the label used to describe the judicial demand is not controlling-that is, we must analyze the substance of the district court's decision, not its label or form." Albright, 59 F.3d at 1092 (quotation, citation omitted).

Thus, we must determine if the district court's order to remand, which is the decision giving rise to

this appeal, is final.[2] The Tenth Circuit has declined to adopt a hard-and-fast rule regarding whether a district court's order remanding a benefits determination to a plan administrator is final, and therefore appealable, under 28 U.S.C. § 1291. "The decision should be made on a case-by-case basis applying well-settled principles governing 'final decisions.' " Rekstad, 238 F.3d at 1263; see also Metzger v. UNUM Life Ins. Co., 476 F.3d 1161, 1164 (10th Cir.2007) (same). In Rekstad, both parties appealed a district court's order to remand a benefits determination claim to the plan administrator after the court concluded that the administrator's decision to deny benefits was arbitrary and capricious because it unreasonably relied on one particular doctor's medical examination. 238 F.3d at 1261. We held that the decision to remand was not final in that case.

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[2]Graham potentially could have immediately appealed from the district court's initial decision dismissing her state law claim, which was the *only* claim she alleged in her complaint. She has not done so, though, and instead acquiesced to the district court's conversion of the suit to one stating an ERISA claim. Her notice of appeal characterizes that the earlier decision was interlocutory. The limited statutory exception for permitting interlocutory appeals at 28 U.S.C. § 1292(b) is not met here, because the district court did not certify that the decision should be immediately appealable, and Graham did not request that the court do so.

Likening a benefits determination to a computation of damages, we noted that we had previously held that "a district court's grant of summary judgment to the plaintiff on an ERISA claim that left the question of damages unresolved was not a final appealable order." Id. at 1262 (citing Albright, 59 F.3d 1089). "[T]he well-accepted rule [is] that an order determining liability but leaving damages to be calculated is not final unless the correct amount of damages is self-evident and not likely to be the subject of future appeal." Id. And a district court's remand of a benefits decision to a plan administrator similarly is indeterminate. Id.

In Rekstad, we also drew a comparison between a district court's remand to a plan administrator and a remand to an administrative agency, calling it "perhaps the best analogue to an ERISA remand." Id. at 1262. "In the administrative context, a remand order is 'generally considered a nonfinal decision ... not subject to immediate review in the court of appeals.' " Id. (quoting Baca-Prieto v. Guigni, 95 F.3d 1006, 1008 (10th Cir.1996)). We recently reiterated the administrative agency analogue in Metzger. See 476 F.3d at 1164.

However, we also have held that the "practical finality rule" provides an important caveat that could result in jurisdiction over an appeal of a remand decision. Rekstad, 238 F.3d at 1262. The practical finality rule may be invoked when the lack of immediate review of an order for an administrative

remand "would violate basic judicial principles." Baca-Prieto, 95 F.3d at 1008 (quoting Bender v. Clark, 744 F.2d 1424, 1427 (10th Cir.1984)). "In the context of a district court order remanding a matter to an administrative agency, jurisdiction may be appropriate when the issue presented is both urgent and important." Trout Unlimited v. U.S. Dep't of Agric., 441 F.3d 1214, 1218 (10th Cir.2006) (citing Bender, 744 F.2d at 1427). "If these two conditions are met, this court will apply a balancing test and assert jurisdiction if 'the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review.' " Id. (quoting Bender, 744 F.2d at 1427). Under this rule, we review orders to remand a matter to an administrative agency when it is necessary to ensure that we can review important legal questions which a remand may make "effectively unreviewable," because administrative agencies "may be barred from seeking district court (and thus circuit court) review of their own administrative decisions." Rekstad, 238 F.3d at 1262 [3] see also Metzger, 476 F.3d at 1165

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[3] Rekstad's formulation of the practical finality rule borrows some concepts from the collateral order doctrine, which also provides a limited avenue for appealing an order that otherwise might be deemed non-final. The Supreme Court articulated the standards for appealing collateral orders in Cohen v. Beneficial Industrial Loan Corp. See337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). "To be appealable under the collateral order doctrine, an order must

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[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Stubblefield v. Windsor Capital Group, 74 F.3d 990, 997 (10th Cir. 1996) (applying Cohen (quotation omitted)); see also Timpanogos Tribe v. Conway, 286 F.3d 1195, 1200 (10th Cir.2002) (describing applicability of the collateral order doctrine over "an extremely narrow class of claims raised interlocutorily," and noting that the rule "sets a high bar").

The "practical finality rule," derived from Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152-53, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964), provides a somewhat broader opportunity for appeal than the collateral order doctrine. "[T]he finality requirements of 28 U.S.C. § 1291... need not strictly come within the Cohen [ ] 'collateral order' doctrine if, in a practical sense, justice may require immediate review." Cotton Petroleum Corp. v. U.S. Dep't of Interior, 870 F.2d 1515, 1522 (10th Cir.1989) (citing Bender, 744 F.2d at 1426-27). We have contrasted the "balancing test" of the practical finality rule with "the mechanical analysis of the collateral order doctrine."Id. (quoting Bender, 4 F.2d at 1427).

We have observed that the practical finality rule has led a "checkered life ... in both our court and the United States Supreme Court," and we have "openly questioned whether [the] doctrine of practical finality is still viable." Baca-Prieto, 95 F.3d at 1009 (quotations omitted). We have suggested, though, that the doctrine is more robust in the context of agency review. See id. (noting that "this court has developed a particular form of practical finality ... as a prudential limitation on the administrative-remand rule"); Rekstad, 238 F.3d at 1262 (noting the practical finality rule "exists in the administrative agency context, if nowhere else"). Still, we have cautioned that the doctrine "must be narrowly construed to preserve the vitality of § 1291." Trout Unlimited, 441 F.3d at 1219 (alteration, quotation omitted).

Pursuant to Rekstad's rule that we evaluate the finality of an ERISA remand order on a case-by-case basis, and applying the factors discussed in Rekstad, the district court's order here remanding Graham's claim to Hartford is not final. The district court did not decide that Graham was eligible for benefits. It concluded only that Hartford's denial of her benefits violated ERISA because Hartford's decision was arbitrary and capricious. Graham articulates no argument that a remand of her benefits claim to Hartford falls within the practical finality exception employed by this circuit. [4]e discern nothing on appeal

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[4] Although Graham filed a supplemental brief devoted solely to the question of jurisdiction and

that is "urgent" or presents a "danger of injustice" if not immediately appealable. Trout Unlimited, 441 F.3d at 1218.

Hartford's redetermination of Graham's claim-which, Hartford assured the court at oral argument, would be de novo-may lead to an award of benefits for Graham. If Hartford again determines that Graham is ineligible for benefits, she may return to district court to argue that Hartford's decision violates ERISA [5]e observe that Hartford has conceded that if its benefits determination on remand "is unfavorable to [Graham], she may simply move to reopen the case, or file an amended complaint to address any dissatisfaction with Hartford's decision on remand."

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finality, her main argument was that the district court erred in ordering a remand to Hartford rather than directing an award of benefits. This line of argument conflates the merits of her appeal with the question of jurisdiction, since even if the district court's decision to remand was patently wrong, it would not necessarily be final within the meaning of 28 U.S.C. § 1291.

[5]Our conclusion interprets the district court's ERISA remand order as permitting either party to challenge the plan administrator's new eligibility determination. See Bowers v. Sheet Metal Workers' Nat'l Pension Fund, 365 F.3d 535, 537 (6th Cir.2004).

Graham argues that the district court's decision to remand is final in her case because it is based on the earlier decision to dismiss her state law claim that sought punitive damages, a type of relief that is not available from either a plan administrator on remand or a court reviewing the decision under ERISA.[6] But this argument does not change the availability of appellate review after Hartford redetermines Graham's claim for benefits. After the remand to Hartford, Graham still can appeal the district court's decision that ERISA preempts her state law claim, and if successful, she will be able to pursue punitive damages. In other words, this is not a situation in which remand may make either the district court's earlier decision that ERISA preempted Graham's state law claim or the merits of Hartford's decision on Graham's claim for benefits "effectively unreviewable." Rekstad, 238 F.3d at 1262.

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[6]Oklahoma law provides that "[t]ort liability for breach of th[e] duty [of good faith and fear dealing] arises where there is a clear showing that the insurance company unreasonably and in bad faith withheld payment of the claim of the insured." Hale v. A.G. Ins. Co., 138 P.3d 567, 572 (Okla.Ct.Civ.App.2006) (citing Christian v. Am. Home Assur. Co., 577 P.2d 899, 901 (Okla.1977), which holds that breach of the duty of good faith permits the insured to "recover consequential and, in a proper case, punitive, damages").

Graham also contends that the order is a final judgment, because to hold otherwise allows a plan administrator to delay awarding benefits with impunity, since the administrator is not penalized for improperly denying benefits in the first instance. But the mere fact that ERISA does not expressly penalize a plan administrator for its initial arbitrary and capricious denial-an issue of statutory design that rests in the hands of Congress-does not warrant a change in our jurisprudence surrounding finality.7

We note that although circuits vary on how they approach the issue of finality in cases involving ERISA remand orders, see Metzger, 476 F.3d at 1165 n. 1 (describing the circuit split), Graham would fare no better under most of those approaches. The majority of circuits have relied on one of the analogues invoked in Rekstad or the collateral order doctrine in deciding whether a decision to remand a benefits decision to a plan administrator is final. See Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund, 425 F.3d 1087, 1090, 1092 (8th Cir.2005) (following the First, Sixth, Ninth, Tenth and Eleventh Circuits in holding that "an order remanding to an ERISA plan administrator for further proceedings is interlocutory in nature and therefore not immediately appealable, particularly

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7 In any event, ERISA authorizes a district court to award attorney's fees see 29 U.S.C. §1132(g)(1), which likely provides a disincentive for a plan administrator to engage in dilatory tactics purely for the sake of delaying benefits.

when the district court retained jurisdiction or otherwise deferred considering the merits of the administrator's decision being reviewed"). The Sixth Circuit has found that an order to remand was not final, in part because the "assessment of damages or awarding of other relief remains to be resolved." Bowers v. Sheet Metal Workers' Nat'l Pension Fund, 365 F.3d 535, 536 (6th Cir.2004) (quoting Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976)).

A number of other circuits apply the comparatively strict collateral order doctrine as a means for appealing a remand to a plan administrator, and in cases similar to the one at bar, hold that a district court remand order is not final. See Borntrager, 425 F.3d at 1092 (reiterating Supreme Court precedent that the doctrine is a "narrow exception" and noting that "[w]hile there may be factors unique to the world of administrative law that justify a somewhat broader final order exception for orders remanding to federal agencies, in our view no such factors apply to orders remanding to private ERISA plan administrators"); Petralia v. AT & T Global Info. Solutions Co., 114 F.3d 352, 354 (1st Cir.1997) (holding a remand order was not final under the collateral order doctrine, since the issue remanded to the plan was the plaintiff's "continued eligibility for benefits," which was "the very heart of th[e] case"); Shannon v. Jack Eckerd Corp., 55 F.3d 561, 563 (11th Cir.1995) (similarly holding that the decision to remand is not "completely separate" from the merits,

but rather is "inextricably intertwined with the merits of [the claimant's] eligibility for benefits")[8]The Seventh Circuit has taken a minority approach that often concludes that ERISA remand orders are final and appealable. That court observed that "[r]emands to

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[8]The Ninth Circuit has applied to ERISA decisions a hybrid of the practical finality and collateral order doctrines in assessing whether a district court's remand to a plan administrator is final and appealable. Hensley v. Nw. Permanente P.C. Ret. Plan & Trust, 258 F.3d 986, 993 (9th Cir.2001) (defining three factors as "(1) the district court order conclusively resolved a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable").
The Hensley court found that its remand order was a final and appealable decision, because it met all three factors. Central to the dispute was whether the plaintiffs were "employees" under the plan-a severable legal issue necessary to deciding whether the plaintiffs were eligible for plan benefits-and because the plan had determined they were not employees, the plan had never addressed the merits of their claims. Id. at 990-91. Our matter differs in that Hartford does not dispute that Graham is a plan participant, has addressed the merits of her claim for benefits, and will do so again on remand.

plan administrators serve the same functions as remands to the Commissioner [of Social Security], which implies the same jurisdictional treatment for purposes of § 1291." Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 978-79 (7th Cir.1999) (discussing 42 U.S.C. § 405(g) and Sullivan v. Finkelstein, 496 U.S. 617, 625, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990)). The Perlman court also drew support from an analogy to arbitration, since the Federal Arbitration Act permits appeals of district court orders vacating arbitration awards, 9 U.S.C. § 16(a)(1)(E), and a court order to remand to a plan administrator for redetermination is comparable to vacating the plan's denial decision. Perlman, 195 F.3d at 980. However, this minority approach has not been adopted by this circuit, and has not attracted support from other circuits either. Specifically, the Sixth Circuit has criticized the argument comparing ERISA to Social Security remands, noting:

> ...42 U.S.C. § 405(g) specifically grants courts of appeals jurisdiction over orders remanding social security claims to the Commissioner [of Social Security]. No statutory language permits similar appeals under ERISA. The existence of language authorizing appeals from remand orders under the social security laws implies that those orders would not constitute final decisions under 28 U.S.C. § 1291. In the absence of a statutory grant of jurisdiction, this court declines to expand its jurisdiction by analogy.

Bowers, 365 F.3d at 537-38. We reject the minority approach here as well.

Finally, Graham contends that the district court's remand order is final because the court intended its decision to be final, pointing to the docket entries for the January 20, 2006, order and judgment remanding her claim to Hartford, at which the clerk states under each entry, "terminates case." Furthermore, a separate entry was made in the docket for January 20, 2006, stating "Civil Case Terminated."

However, when we question the finality of a district court's decision to remand a benefits determination to the plan administrator, we "analyze the substance of the district court's decision, not its label or form." Albright, 59 F.3d at 1092. For example, in Metzger, we drew no legal conclusions from the fact that the district court had earlier determined that its 2004 remand order was final, because the court effectively amended that order by reversing itself in 2006. Metzger, 476 F.3d at 1164-65. Instead, we held that this series of events rendered the first order interlocutory. Other courts similarly have disregarded the administrative entries regarding the status of an ERISA case when it is clear that the last district court decision was not a final judgment. See, e.g., Petralia, 114 F.3d at 355; Borntrager, 425 F.3d at 1090-91; Williamson v. UNUM Life Ins. Co., 160 F.3d 1247, 1253 (9th Cir.1998). We follow the same path here in holding that regardless of the

notations in the docket entries for the district court's remand decision, that decision is non-final in substance for the reasons given above.

Accordingly, we dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1291.

III. Attorney's Fees

Graham requests that we reverse the district court's decision not to award attorney's fees that are authorized in ERISA actions.[9] However, we conclude that the motion for fees was not ripe before the district court, and therefore we vacate the district court's 1decision and remand with instructions to dismiss the motion without prejudice.

"The ripeness doctrine stems from the 'cases and controversies' requirement in Article III, and it also reflects important prudential limitations on a court's exercise of jurisdiction." Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc., 454 F.3d 1128, 1140 (10th Cir.2006) (quotation, alterations omitted). "[R]ipeness is a justiciability doctrine designed to

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[9]See 29 U.S.C. § 1132(g)(1) ("In any action under this title ... by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.").

prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Morgan v. McCotter, 365 F.3d 882, 890 (10th Cir.2004) (quoting Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003)). A question of ripeness focuses on "whether the harm asserted has matured sufficiently to warrant judicial intervention." Id. (quoting Warth v. Seldin, 422 U.S. 490, 499 n. 10, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). "Determining whether the issues presented by this case are ripe for review requires us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. (quotation omitted).

Courts vacate attorney's fees decisions when the presence of ongoing litigation precludes an informed determination of whether the moving party is in fact entitled to attorney's fees under the relevant law. See, e.g., Bennett v. Coors Brewing Co., 189 F.3d 1221, 1238, 1239 (10th Cir.1999); see also Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 674 (9th Cir.2004); Star Phoenix Mining Co. v. West One Bank, 147 F.3d 1145, 1148 (9th Cir.1998)

Courts considering whether to award attorney's fees in ERISA actions consider five factors: a party's culpability or bad faith; its ability to satisfy an award of fees; the deterrence value of an award; the number of plan participants affected by the case or the

significance of the impact of the legal question involved; and "the relative merits of the parties' positions." Gordon, 724 F.2d at 109. We also afford certain weight to prevailing party status, even though we acknowledge that the ERISA attorney's fees provision is not expressly directed at prevailing parties. See, e.g., Deboard v. Sunshine Mining & Ref. Co., 208 F.3d 1228, 1245 (10th Cir.2000) (reversing and remanding an attorney's fee award because appellate decision "alter[ed] the relative merits of the parties' positions"); Morgan v. Indep. Drivers Ass'n Pension Plan, 975 F.2d 1467, 1471 (10th Cir.1992) ("Although the statute does not expressly require that a party prevail as a condition to receiving an award of attorneys' fees ... we have remanded cases for denial of fees without explanation only when the party seeking fees had prevailed at least partially."(citations omitted)); Arfsten v. Frontier Airlines, Inc. Ret. Plan for Pilots, 967 F.2d 438, 442 n. 3 (10th Cir.1992) ("Because we reverse the district court's decision on the merits, plaintiff is not a prevailing party, and his arguments on attorney's fees are moot.").

In this case, the district court denied Graham's motion for attorney's fees, concluding that its determination that Hartford acted arbitrarily and capriciously did not equate to a finding of bad faith under the first Gordon factor. The court found two other Gordon factors similarly were not satisfied here, because (1) Graham pursued benefits for only herself and her action did not involve a significant legal question and (2) the record did not suggest that her

claim for benefits was "particularly meritorious." Ordinarily, we review district courts' attorney's fees decisions for abuse of discretion. Gordon, 724 F.2d at 108.At this point in the litigation, however, a decision regarding attorney's fees is premature. The district court cannot properly apply the five-factor Gordon test, particularly with respect to the merits of the parties' positions and the impact of the litigation on other beneficiaries, when it remains to be seen whether Graham is entitled to benefits under the plan. Hartford will make a new determination of Graham's eligibility for benefits, and if eligibility is denied again, Graham will have the opportunity to re-argue before the district court that Hartford's new decision violates ERISA. The issues presented in Graham's motion for attorney's fees are not "fit" for judicial decision at this time. Morgan, 365 F.3d at 890. [10]

In dismissing the current fee motion on grounds of ripeness, we do not intend to create a per se rule

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[10] Graham argues that courts need to award attorney's fees in ERISA cases even at the remand stage in light of the realities of ERISA litigation, which often feature a plaintiff suffering from health problems who can afford to hire a lawyer only on a contingency fee arrangement. However, initiating this type of policy decision in authorizing attorney's fees properly lies with Congress.

that attorney's fees are inappropriate whenever a district court decides to remand a claim to the plan administrator rather than ordering benefits directly.[11] ERISA provides procedural protections to plan participants by statute and in its implementing regulations, which require plan administrators to provide certain notices and appeals procedures in making benefits determinations. *See, e.g.*,29 C.F.R. § 2560.503-1 (setting forth minimum requirements for claims procedures in employee benefit plans). It is theoretically possible for a claimant to bring suit for egregious violations of ERISA's procedural protections and, upon remand to the plan administrator, still not succeed in obtaining benefits. The judicial discretion provided by 29 U.S.C. § 1132(g)(1) and our five-factor Gordon test permit a court, in the right case, to reward plaintiffs for holding plans accountable under ERISA.

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[11]Hartford argues that we have no jurisdiction over the appeal of the denial of attorney's fees because the underlying order to remand to the plan administrator is not a final decision within the meaning of 28 U.S.C. § 1291. However, a petition for attorney's fees is considered "collateral to and separate from" the decision on the case's merits. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988) (quotation omitted). Because our guidance on awarding attorney's fees under ERISA does not necessarily preclude an award when the district court remands a claim to the plan administrator, the district court's decision regarding fees in such a case is not inherently interlocutory.

However, Graham does not argue that Hartford systemically is violating ERISA procedures-and indeed, does not cite to any specific regulatory or procedural violation by Hartford-that would have made the issue of attorney's fees ripe in this case.

Because the district court decided the issue of attorney's fees before it was ripe, we vacate that decision and remand with instructions to dismiss without prejudice Graham's claim for fees.

IV. Conclusion

We hold that the district court's decision remanding Graham's claim to Hartford for a full and fair redetermination of her eligibility for long-term disability benefits is not a final decision under the meaning of 28 U.S.C. § 1291, and therefore we DISMISS appeal No. 06-5054 for lack of jurisdiction. We conclude that, under the facts of this case, the related action for attorney's fees, No. 06-5142, is not ripe, because several of the factors we assess for the appropriateness of fees cannot be ascertained until Hartford redetermines Graham's entitlement to benefits. Therefore, we VACATE the district court's denial of Graham's motion for attorney's fees and REMAND with instructions to dismiss her motion without prejudice.

APPENDIX

28 U..S.C.A. § 1291

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 83 - COURTS OF APPEALS

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

29 U.S.C.A. § 1132

UNITED STATES CODE ANNOTATEDTITLE 29. LABORCHAPTER 18 - EMPLOYEE RETIREMENTINCOME SECURITY PROGRAMSUBCHAPTER I - PROTECTION OFEMPLOYEE BENEFIT RIGHTSSUBTITLE B - REGULATORY PROVISIONSPART 5 - ADMINISTRATION AND ENFORCEMENT

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the he Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any

provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (1) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title of[12] the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if -

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[12] So in original. Probably should be "subtitle".

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 119lb(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet therequirements of paragraph (1) or (4) of section 1166 ofthis title or section 1021(e)(1) of this title with respect to a or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to 8100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1.320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties.

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's ee —and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan -

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of -

(i) interest on the unpaid contributions,

or

(ii) liquidated damages provided for under the plan n an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as

the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries
(1) In the case of -

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) -

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that -

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.